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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-27

EDWARD LECCI, Individually and as representative of Nassau County Patrolmen's Benevolent Association,

Petitioners,

v.

FRANCIS B. LOONEY, as Commissioner of the Police Department, Nassau County and the NASSAU COUNTY POLICE DEPARTMENT,

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the Court of Appeals for the State of New York

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Argument in Opposition to Granting a Writ of Certiorari.

POINT I

The action was properly dismissed, there being no justiciable controversy.

The State Supreme Court may render a declaratory judgment only where a justiciable controversy exists. CPLR §3001. An actual and justiciable case or controversy is as fundamental to actions for declaratory relief as it is to any other form of judicial relief. *Jacob Goodman & Co.* v. *New York Telephone Co.*, 309 N.Y. 258 (1955).

In the instant case, no justiciable controversy exists. Appellant does not allege that he is the subject of an investigation by the Police Department or of a departmental disciplinary proceeding, and he is not presently aggrieved. See *Haber* v. *Board of Estimate of City of New York,* 33 A.D. 2d 571 (1969); *Matter of Donohue* v. *Cornelius,* 17 N.Y. 2d 390 (1966). Where the existence of a controversy is dependent upon the happening of future events, the court will not render a decision. *Prashker* v. *United States Guarantee Co.,* 1 N.Y. 2d 584 (1956).

A declaratory judgment is proper to determine the constitutionality of a statute only where there is an actual controversy presented between adverse parties. *Weiss* v. *New York,* 52 Misc. 2d 391, 275 N.Y.S. 2d 557 (1966).

Therefore, the courts below properly dismissed the complaint on the ground that no justiciable controversy existed between the parties.

POINT II

Commissioner's Order Number 45, Subdivision V, is constitutional in every respect.

The declaratory judgment action commenced by petitioner herein was an attempt to prevent the Police Commissioner from carrying out the provisions of Commissioner's Order Number 45, Subdivision V, which provides as follows:

> "If an investigation involves misconduct by a police officer of a criminal nature, it is the established practice of the Department to advise the member of the fact and his right to remain silent or to be represented by counsel and to afford him the opportunity to exercise such rights when applicable and as provided by existing law. However, in such cases, the

> Department does insist on exercising its legal right to have the member account for his actions for purposes of internal disciplinary action. Such an accounting, if incriminating in nature, cannot be used in a criminal proceeding unless given under a waiver."

This question has been litigated on many occasions and has reached the United States Supreme Court. On January 16, 1967, in the case of *Garrity* v. *New Jersey*, 385 U.S. 493, 500, this court held:

> "We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all whether they are policemen or other members of our body politic."

On the same day, in the case of *Spevack* v. *Klein*, 385 U.S. 511, 519, the United States Supreme Court stated:

> "This Court has never held, for example, that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer. It is quite a different matter if the State seeks to use the testimony given under this lash in a subsequent criminal proceeding." *Garrity* v. *New Jersey*, 385 U.S. 493.

The question again reached this Court in the case of *Gardner* v. *Broderick*, 392 U.S. 273, 278, where the court held:

> "If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect

> to the use of his answers or the fruits thereof in a criminal prosecution of himself, Garrity v. New Jersey, supra, the privilege against self-incrimination would not have been a bar to his dismissal."

In this latter case (*Gardner* v. *Broderick, supra*), the plaintiff was a police officer and the defendant the Police Commissioner of the Police Department of the City of New York. There, the court specifically held that a police officer could be dismissed from his position as a police officer if he refused to answer questions specifically, directly and narrowly relating to the performance of his official duties, without being required to waive immunity with respect to the use of his answers in a criminal prosecution.

In Commissioner's Order Number 45, Subdivision V, Police Commissioner Looney specifically confines himself to the request for answers specifically, directly and narrowly relating to the performance of the police officer's official duties without asking the police officer to waive immunity. Said Subdivision V further provides that the answers, if incriminating in nature, cannot be used in a criminal proceeding unless given under a waiver of immunity. It must, therefore, follow that if a police officer refuses to account for his actions and refuses to answer questions specifically, directly and narrowly relating to the performance of his official duties when requested to do so pursuant to Order 45, Subdivision V, such refusal would not be a bar to his dismissal (*Gardner* v. *Broderick, supra*). If such refusal would not be a bar to his dismissal, then it is not in violation of such police officer's constitutional rights and privileges to insist that he account for his actions for purposes of internal disciplinary action. It is very clearly indicated in said Subdivision V that such accounting, if incriminating in nature, cannot be used in a criminal proceeding unless given under a waiver.

According to the decisions rendered by the United States Supreme Court, the entire contents of Subdivision V are constitutional in every respect.

CONCLUSION

For all of the reasons set forth above, Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied, with costs.

Respectfully submitted,

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